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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-280

CONSOLIDATED OIL AND GAS, INC., ESTATE OF JOHN M. KING, BANKRUPT, AND LAKESHORE ASSOCIATES,
Petitioners

vs.

KING RESOURCES COMPANY, CHARLES A. BAER, Trustee of King Resources Company and PHOENIX RESOURCES COMPANY (a reorganized company formerly known as King Resources Company),
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT, CHARLES A. BAER, TRUSTEE, IN OPPOSITION

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STATEMENT OF THE CASE

For the most part, Respondent, Charles A. Baer, Trustee of King Resources Company (K.R.C.), is able to accept the statement of the case contained in the Petition. However, certain additional facts need to be mentioned.

The Petitioners contracted to buy undivided interests in certain Canadian Federal Oil and Gas Exploration Permits covering in excess of 35 million gross acres in Canadian Arctic regions. By their agreements, the Petitioners were to pay a down payment, certain regularly scheduled installments, and a proportionate share of exploration costs to maintain the permits. While each claimant paid its initial down payment plus some exploration expenses, none paid the full contract price or exploration obligations.

After the commencement of the K.R.C. reorganization proceeding, the Respondent Trustee filed his petitions to reject the contracts of Consolidated Oil and Gas, Inc. (Consolidated) and John M. King as executory contracts under Section 116(a) of the Bankruptcy Act, 11 U.S.C. Section 516(1). As stated in the Petitioner's Statement of Case, the Trustee and Lakeshore Associates agreed to the rejection of that agreement. The John M. King agreement was declared executory and rejected by the reorganization court. *King v. Baer*, 482 F.2d 552 (10th Cir. 1973), *cert. denied*, 414 U.S. 1068. The Consolidated agreement was ordered rejected on January 18, 1977 after Consolidated took the position that it did not oppose rejection of its agreement. Thus, Consolidated conceded that there were substantial remaining executory obligations under the contract, and that its only potential recovery would be for damages, if any, suffered as a result of rejection. That was the issue tried before the reorganization court. The reorganization court's opinion of July 31, 1978 goes into much detail concerning the testimony which was presented to determine whether any damages were incurred as a result of rejection. *See*, Memorandum Opinion of the Reorganization Court in Petitioner's Petition at 29, 31-38. The reorganization court had before it a number of theories about how to value the interests in the permits. That value had to be determined by the court in order to compare it against the remaining obligations of the Petitioners under their contracts in order to determine whether any of the Petitioners had suffered damages. The trial court determined what the fair market value and going-concern values of the subject interests were to each Petitioner. It considered evidence of comparable sales or trades as a "check" against the various theories presented by the experts for both sides. *See*, Memorandum Opinion at 34-37 in Petitioner's Petition. Having found the values of the rejected contracts, the court was compelled to award no damages,

since the remaining executory obligations of the Petitioners to K.R.C. exceeded the determined values in each case.

As Petitioners suggest, the reorganization court's exposure to the particular properties which were the subject of the rejected contracts had occurred over the course of the entire reorganization proceeding. The interest of the debtor, K.R.C., in the subject properties was a matter which the reorganization court dealt with on a number of occasions in connection with determining the debtor's insolvency, and as a part of the plan of reorganization. The Petitioners were parties to the reorganization proceeding over its full course of nearly seven years. They were apprised at all times of the reorganization court's hearings with respect to the valuation of the subject properties. Over the several years and numerous hearings, Petitioners had every opportunity to participate in the reorganization proceedings. At the time of the trial on their claims, they were well aware of the reorganization court's ruling as to the value of the subject assets for reoganization valuation purposes. They made no objection to the trial being held before the reorganization judge until before the Tenth Circuit.

REASONS FOR DENYING THE WRIT

Contrary to Petitioner's suggestions, the decision of the Court of Appeals below does not depart from accepted judicial procedure, nor does it misapply any rules of law with regard to calculation of damages. The Petitioners suggest an interpretation of 28 U.S.C. § 455 for which even they in their Petition cannot cite a single supporting authority.

With regard to their contentions concerning damages, their arguments are more properly ones made to the trier of fact rather than this Court.

There exists no compelling reason for this Court to review this case, and the Petition for Certiorari should be denied.

I

APPELLANTS WERE AFFORDED DUE PROCESS BY THE REORGANIZATION COURT AND THAT COURT COMMITTED NO ERROR IN FAILING TO DISQUALIFY ITSELF.

Petitioners urge that the Court of Appeals and the reorganization court committed error in failing to hold that the reorganization judge was unable to accord Petitioners a fair trial. The Petitioners also contend that the reorganization judge was required to recuse himself *sua sponte*.

It must be noted that Petitioners do not claim any personal bias on the part of the reorganization judge, but merely that because he had considered valuation of the permits for reorganization purposes, and apparently had found the testimony of the Trustee's witnesses persuasive before, then he automatically was prejudiced. As the Court of Appeals properly recognized, the decision of a judge to recuse himself generally is acknowledged to be confined to the consideration and discretion of the judge himself. *See, e.g., Shadid v. Oklahoma City*, 494 F.2d 1267 (10th Cir. 1974). The Petitioners here made absolutely no complaint until after the judge's decision adverse to their position had been published. [1] To allow litigants to await the outcome of a judge's decision before raising the disqualification issue would be to promote a most reprehensible form of uncertainty, inefficiency and forum shopping.

This is especially so when, as is the case herein, the litigants did not allege a personal bias, but rather alleged prejudice arising out of the mere exercise of the judge's

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[1] Note that where as here the alleged ground for disqualification is asserted to be under 28 U.S.C. § 455(a), the parties may waive said ground. 28 U.S.C. § 455(e). In the light of the parties' full knowledge of the now alleged basis for disqualification they must be deemed to have waived the same.

judicial obligations—namely, his overseeing of an ongoing reorganization proceeding, during which time he had gained familiarity with particular assets, issues and other matters. Under the Bankruptcy Act, 11 U.S.C. § 1, et. seq., Congress vested jurisdiction for Chapter X reorganization proceedings in a single reorganization judge. The Act itself thus contemplated that the very proceedings in question here, involving executory contracts, the resolution of claims and the approval and confirmation of a plan of reorganization shall be heard by a single reorganization court. In general, facts learned by a judge in his judicial capacity are not a proper basis for disqualification. *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1977), *cert. denied*, 430 U.S. 931. There is absolutely no support, and Petitioners therefore cite none, for the proposition that the reorganization judge must recuse himself *sua sponte*, without any hint from the litigant itself. Judicial consistency normally is viewed as an admirable trait. As the Court of Appeals below noted, the trial judge expressed the view that he should attempt to be consistent. *See*, Opinion of the Court of Appeals, at Page 27 of Petitioners' Petition. There is absolutely nothing which Petitioners point to in their Petition to indicate that the reorganization judge was anything but fair and impartial in the trial of their claims. The Court of Appeals was legally correct in holding that there was no evidence of impropriety on the part of the reorganization judge and that Petitioners' request for recusal after the publication of an adverse decision was untimely.

II

THE LOWER COURTS PROPERLY DETERMINED THE MEASURE OF DAMAGES FOR REJECTION OF THE EXECUTORY CONTRACTS.

The Petitioners' contentions concerning damages are that the lower courts erred in not adopting the testimony

of Petitioners' experts, and that the testimony of Respondent's witnesses should have been rejected.

Petitioners' contentions to the contrary notwithstanding, the reorganization court properly recognized that it was faced with a very basic, straight-forward question of the amount of damages suffered as a result of rejection, or breach, of contract. The entire thrust of the Petitioners' argument is that the assumptions, predictions and calculations of their experts more accurately measured the value of the permits than either the assumptions, predictions or calculations of the Respondents' witnesses. The trial court is invested with broad discretion, as the Court of Appeals recognized, in such respects. The exercise of that discretionary jurisdiction simply is not a proper subject for review in this Court.

The reorganization court applied fundamently recognized principles of law in calculating damages. It recognized the need to determine the fair market value and going-concern values of the subject properties. It arrived at those values by placing greatest reliance on the evidence of comparable sales or trades which were before it. See reorganization court opinion at 34-35 of Petitioners' Petition. The court used these known values, arrived at through arms-length transactions, as a guide against which to measure the predictions and theories of the respective expert witnesses. The reorganization court properly exercised its discretion after comparing the testimony of all witnesses against the values of comparable sales or trades. Once the court arrived at the value of the Petitioners' contracts, it was compelled to find that Petitioners suffered no damages. As far as can be determined, the Petitioners do not contend that the lower courts erred in any of this methodology, but rather that they erred in failing to ascribe a high enough value to the subject properties. These arguments were properly addressed to the discretion of

the reorganization court, which rejected them. The Court of Appeals properly held that the findings of the reorganization court were not clearly erroneous and that the reorganization court had not erred in arriving at the calculation of damages. The arguments afford no proper or viable ground for granting the Petition for Certiorari herein.

III.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be denied.

Respectfully submitted,

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